

**LIBRARY**  
**SUPREME COURT, U. S.**

Office-Supreme Court, U.S.  
**FILED**

**SEP 26 1963**

**JOHN F. DAVIS, CLERK**

**IN THE**  
**SUPREME COURT OF THE UNITED STATES**

**No. 107**

**OCTOBER TERM, 1963**

**UNITED STATES OF AMERICA,**

**VS.**

**ROSS R. BARNETT, Governor of the State of Mississippi,**  
**and PAUL B. JOHNSON, JR., Lieutenant Governor**  
**of the State of Mississippi.**

**ON CERTIFICATE FROM THE UNITED STATES COURT OF**  
**APPEALS FOR THE FIFTH CIRCUIT.**

**BRIEF FOR THE DEFENDANTS**

**JOE T. PATTERSON, Attorney General**  
**of the State of Mississippi**

**DUGAS SHANDS, Assistant Attorney**  
**General of the State of Mississippi**

**GARNER W. GREEN**

**JOSHUA GREEN**

**M. M. ROBERTS**

**FRED B. SMITH**

**MALCOLM B. MONTGOMERY, and**

**CHARLES CLARK**

**Special Assistant Attorneys Gen-**  
**eral of the State of Mississippi**

**New Capitol Building**

**Jackson, Mississippi**



## TOPICAL INDEX

Introductory Statement _____	1
Question Presented _____	2
Constitutional Provisions, Statutes and Rules Involved _____	3
Statement of the Case _____	3
Argument—	
I. The Constitution of the United States Guarantees the Right to Trial by Jury in All Cases of Criminal Contempt _____	7
A. Historical Data _____	11
B. Substantive <del>Data</del> <sup>Due</sup> Process Requires that 18 U.S.C. 1509, Be Interpreted to Transpose Criminal Contempt Jurisdiction Included Therein into Federal Criminal Law _____	14
C. The Court's Decision in <i>Green v. U. S.</i> Should Be Reversed _____	22
D. The Ninth and Tenth Amendments Prohibit Any Implied Delegation of Power to Federal Courts to Punish Criminal Contempt Without a Constitutional Trial by Jury _____	34
E. The Observance of Constitutional Safeguards in Criminal Contempt Is Becoming Increasingly Important _____	35
F. Conclusion _____	37
II. Defendants Are Entitled to a Trial by Jury under the Statutes of the United States _____	38
A. The Pertinent Statutes, 18 U.S.C., Sec. 402, and Sec. 3691, Plainly Grant to the Defendants the Right of Trial by Jury _____	38
B. The Action in Which the Charges Were Brought Is Not an Action Brought or Prosecuted by the United States _____	45

C. The United States Does Not Have an Option under the Statutes to Choose to Deny Defendants a Right to Trial by Jury	50
III. An Affirmative Answer to the Question Certified Should Include a Direction Requiring the Court of Appeals to Certify This Case for Trial in the Appropriate District Court	51
Conclusion	53
Appendix—	
The Constitution of the United States—	
8th Amendment	A1
9th Amendment	A1
10th Amendment	A1
United States Code Annotated, Title 18—	
Section 3285	A1
Section 3692	A1
Section 3771	A2
Section 3772	A2
Justice Black's Dissent in <i>Green v. U. S.</i> , 356 U.S., pp. 193-219	A3

### Index to Authorities

#### CASES

<i>Adams v. United States</i> , 302 F.2d 307	21
<i>Anderson v. Dunn</i> , 6 Wheat. 204	18
<i>Bells Gap. R. Co. v. Pennsylvania</i> , 134 U.S. 232, 237	42
<i>Berger v. Douglas Co. Commissioners</i> , 5 Fed. 23, 26	47
<i>Bessette v. W. B. Conkey Co.</i> , 194 U.S. 324	25
<i>Brown v. United States</i> , 359 U.S. 41, 63	33
<i>Cooke v. U. S.</i> , 267 U.S. 517	17
<i>Craig v. Hecht</i> , 263 U.S. 255, 278, 9	25

# INDEX

III

<i>Cranch v. Nevada</i> , 6 Wall. 35	45
<i>Deutch v. U. S.</i> , 267 U.S. 456	18
<i>Duke v. Committee, etc.</i> , (D.C. Cir.) 82 F.2d 890	21
<i>Ex parte Grossman</i> , 287 U.S. 87	17, 30
<i>Ex parte Milligan</i> , 4 Wall. 2, 123 (1886)	15
<i>Ex parte Robinson</i> , 19 Wall. 505	18
<i>Ex parte Savin</i> , 131 U.S. 287	18, 19
<i>Gibbons v. Ogden</i> , 9 Wheat. 1	31
<i>Gilbert Green et al. v. United States</i> , 356 U.S. 165	7, 17, 19, 22, 24, 25, 30, 31, 32
<i>Goldenberg v. Murphy</i> , 108 U.S. 162	47
<i>Gommillion v. Lightfoot</i> , 364 U.S. 339	51
<i>Gompers v. Buck's Stove &amp; Range Co.</i> , 221 U.S. 418	17, 22
<i>Gompers v. U. S.</i> , 233 U.S. 604	17, 30, 49
<i>Griffin v. People of the State of Illinois</i> , 351 U.S. 12.	16, 21
	15, 16, 19, 43
<i>Hague v. C.I.O.</i> , 307 U.S. 496, 514	48
<i>Hedges v. Dixon County</i> , 150 U.S. 182	29
<i>Hopkins v. Oxley Stave Co.</i> , 83 Fed. 912	26
<i>Houston &amp; N. Texas Motor Freight Lines, Inc., v. Local</i> 745, (N.D. Tex.) 27 F. Supp. 145	18, 53
<i>Hurd v. Hodge</i> , 334 U.S. 24	43
<i>In re Debs</i> , 158 U.S. 564, 595, 596	22, 25, 27, 28, 29
<i>In re McConnell</i> , 370 U.S. 230	18
<i>In re Murchison</i> , 349 U.S. 133	17, 20, 52
<i>In re Oliver</i> , 333 U.S. 247	17
<i>In re Terry</i> , 128 U.S. 289	19, 25
<i>James H. Meredith v. Charles Dickson Fair et al</i> , No. 19475	29, 46, 49
<i>Kinney v. Plymouth Rock Squab Co.</i> , (1st Cir.) 213 Fed. 449	21
<i>Levine v. U. S.</i> , 362 U.S. 610, 616	18
<i>Magniac v. Thompson</i> , 56 U.S. 281	29
<i>Martin v. Hunters Lessee</i> , 1 Wheat. 304, 324	35

<i>Mayflower Farms v. Ten Eyck</i> , 297 U.S. 266	42
<i>McCullough v. Maryland</i> , 4 Wheat. 316, 404, 5	34
<i>Michaelson v. U. S.</i> , 266 U.S. 42	18, 49
<i>Millslagle v. Olson</i> , (8th Cir.) 128 F.2d 1015	21
<i>Mississippi et al. v. Meredith, etc.</i> , Cause No. 661, October, 1962 Term	4
<i>Monroe v. Pope</i> , 365 U.S. 167	48
<i>New Orleans v. New York Mail Steamship Co.</i> , 87 U.S. 387, 392	30
<i>Nye v. U. S.</i> , 313 U.S. 33	19
<i>Offutt v. U. S.</i> , 348 U.S. 11	32
<i>Packer Corp. v. Utah</i> , 285 U.S. 105	42
<i>Pine Grove Township v. Talcott</i> , 19 Wall. (86 U.S.) 666	23
<i>Ryan v. U. S.</i> , (8th Cir.) 99 F.2d 864, 871	21
<i>Scott v. Sandford</i> , 19 How. 393, 450	42, 44
<i>Steele v. L. &amp; N. R. Co.</i> , 323 U.S. 192	43
<i>Swift &amp; Co. et al. v. U. S.</i> , 276 U.S. 311	40, 41
<i>Thiel v. So. Pac. Co.</i> , 328 U.S. 217	43
<i>Thompson v. Utah</i> , 170 U.S. 343	12
<i>Twining et al. v. New Jersey</i> , 211 U.S. 78	26
<i>United States v. Alabama</i> , 171 F. Supp. 720, 729, 267 F.2d 808, reversed 363 U.S. 602	48
<i>United States v. Classic</i> , 313 U.S. 299, 316	23
<i>United States v. Cooper Corp.</i> , 312 U.S. 600, 604	48
<i>United States v. Hall</i> , 98 U.S. 343	14
<i>United States v. Hudson and Goodwin</i> , 7 Cranch 32	14
<i>United States v. United Mine Workers</i> , 330 U.S. 258, 342	2, 48
<i>Van Horne's Lessee v. Dorrance</i> , 2 Dallas 304, 309	14
<i>Warring v. Huff</i> , 121 F.2d 641	31
<i>Weiss y. Stearns</i> , 256 U.S. 242, 254	51
<i>Wood v. Georgia</i> , 368 U.S. 894	17

# INDEX

v

## OTHER AUTHORITIES

Act of Mar. 2, 1831, c. 99; 4 St. 487, Recodified by the revisor as §§ 725 and 5399 of Rev. St. _____	19
Blackstone, 3 Comm. 379 _____	14
Blackstone, 4 Comm., c. 20, § 2 _____	24
Cong. Rec., 45th Cong., 2nd Sess., pp. 1376, 7 _____	19
48 Cong. Rec. 8801 _____	44
Douglas, pp. 86-88, 149, 195, Almanac of Liberty _____	12
Encyclopedia Britannica, "Doomsday Book" _____	11
Federal Rules of Criminal Procedure, Rule 18 _____	50, 52
Federal Rules of Criminal Procedure, Rule 42(a) _____	19
Federal Rules of Criminal Procedure, Rule 42(b) _____	6, 17, 39, 52
Federal Rules of Criminal Procedure, Rule 46 _____	17
Fox, The History of Contempt of Court 38 (1927) _____	24
43 Harvard Classics, 147 _____	13
21 Harv. L. Rev. 161, Contempt of Court, Criminal and Civil, Joseph H. Beale, Jr. _____	18
39 Harvard Law Review 917, 968, 974 _____	13
Hearings before Subcommittee on Constitutional Rights of the Judiciary Committee of U. S. Senate, 86th Congress, 1st Session 1959, pp. 186-189 _____	14
Jacob's Law Dictionary, 9th Ed. (1772) _____	24
18 Law Q. Rev. 347, Government by Injunction _____	29
Lesser, History of the Jury System, 151 _____	23
57 Mich. L. Rev. 258, 261 _____	24
61 Michigan L. Rev. 283 (Dec. 1962) _____	32
Perry, Am. Bar Found., 8 Sources of Our Liberties, 323 et seq. _____	11, 12, 13
Plucknett, p. 134, Concise History of the Common Law, 5th Ed. _____	12
Pub. L. 86-449, Title I, § 101, May 6, 1960, 74 Stat. 86 _____	3
26 Stat. 826 _____	25, 40
27 Stat. 434 _____	40
36 Stat 1131 _____	40

38 Stat. 730	40-41
62 Stat. 870	40
2 Story, Const., Sec. 1779	15
The Federalist, No. LXXXIII, Lodge Ed., 521	24
The Federalist, No. LXXXVIII, Lodge Ed., 521	24
7 U.S.C. 216	37
7 U.S.C. 292	36
7 U.S.C. 608 (7)	37
7 U.S.C. 608a-6	37
10 U.S.C., §§ 822, 823	21
12 U.S.C. 1731b	37
15 U.S.C. 4	36
15 U.S.C. 9	37
15 U.S.C. 25	36
15 U.S.C. 53	36
15 U.S.C. 68e	37
15 U.S.C. 69g	36
15 U.S.C. 77t	37
15 U.S.C. 78u	37
15 U.S.C. 80a-34	36
15 U.S.C. 80a-35	36
15 U.S.C. 80a-41	37
15 U.S.C. 80b-9	36
15 U.S.C. 522	36
15 U.S.C. 1195	37
16 U.S.C. 825m	36
28 U.S.C., § 41, pp. 314, 5	40
29 U.S.C. 204b	37
29 U.S.C. 216 (c), 217	37
29 U.S.C. 921a	37
33 U.S.C. 519	36
33 U.S.C. 921	37
42 U.S.C. 1816	36
42 U.S.C. 1971	36

# INDEX

VII

43 U.S.C. 1062	36
47 U.S.C. 36	37
49 U.S.C. 916	37
49 U.S.C. 1017	36
60 U. S. Code Cong. and Adm. News, p. 1942	14
United States Code Annotated, Title 18—	
Section 402	38, 39, 40, 41, 43, 44, 45, 51
Section 3231	53
Section 3285	A1
Section 3692	19, 27, A1
Section 3771	52, A2
Section 3772	52, A2
Section 1509	3, 11, 19
Section 1995	19
Section 3691	19, 38, 39, 41, 42, 47
United States Code, Title 28, § 144	20-21
United States Code, Title 28, § 455	20-21
U.S.C., Title 28, § 17 (1940 Edition)	40
U.S.C., Title 42, Section 1971(c)	48
United States Constitution—	
Fifth Amendment	13, 42, 45
Sixth Amendment	13, 53
Seventh Amendment	13
Eighth Amendment	9, 30, A1
Ninth Amendment	34, 35, A1
Tenth Amendment	34, 35, A1
Fourteenth Amendment	42
Fifteenth Amendment	48
United States Constitution, Article I, Sec. 3, Cl. 7	23
United States Constitution, Article III, Section 2,	
Clause 3	13, 23, 53
United States Constitution, Article IV, Section 2	44, 45



**IN THE  
SUPREME COURT OF THE UNITED STATES**

---

**No. 107**

---

**OCTOBER TERM, 1963**

---

**UNITED STATES OF AMERICA,**

**VS.**

**ROSS R. BARNETT, Governor of the State of Mississippi,  
and PAUL B. JOHNSON, JR., Lieutenant Governor  
of the State of Mississippi.**

---

**ON CERTIFICATE FROM THE UNITED STATES COURT OF  
APPEALS FOR THE FIFTH CIRCUIT.**

---

**BRIEF FOR THE DEFENDANTS**

---

**INTRODUCTORY STATEMENT**

The prosecution has obviously framed its brief to try to cast this certification as a mere side issue to a segregation controversy. They evidently hope to thus arouse an antipathy toward those who stand accused which may obscure the deprivation of statutory and constitutional due

process. They openly state that the inconvenience of a jury trial which "embarrasses and retards" the vital business of the courts and the "hazard" of acquittal by unsympathetic jurors should be avoided. By this logic they attempt to create a need which authorizes departure from the sacred and fundamental statutory and constitutional procedural rights.

The words of Mr. Justice Rutledge are apposite here:

"This case became a cause célèbre the moment it began. No good purpose can be served by ignoring that obvious fact. But it cannot affect our judgment save only perhaps to steel us, if that were necessary, to the essential and accustomed behavior of judges. In all cases great or small this must be to render judgment evenly and dispassionately according to law, as each is given understanding to ascertain and apply it. No man or group is above the law, nor is any beyond its protection."<sup>1</sup>

### QUESTION PRESENTED

We feel it may be helpful to here repeat that the question certified is:

"Where charges of criminal contempt have been initiated in this Court of Appeals against two individuals, asserting that such individuals willfully disobeyed a temporary restraining order of the Court, which order was entered at the request of the United States, acting as amicus curiae pursuant to its appointment by an order of the Court which granted to it, among other rights, the right to initiate proceedings for injunctive relief, and the acts charged as constituting the alleged disobedience were of a character as to constitute also a criminal offense under an Act of

---

1. U. S. v. United Mine Workers, 330 U.S. 258, 342.

**Congress**, are such persons entitled, upon their demand, to trial by jury for the criminal contempt with which **they** are charged?"<sup>2</sup>

Both under Statute and as a matter of basic constitutional principle the answer should be yes.

### **CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED**

The prosecution has omitted the following most pertinent statute:

Title 18, *United States Code*:

#### **§ 1509. Obstruction of Court Orders.**

"Whoever, by threats or force, willfully prevents, obstructs, impedes, or interferes with, or willfully attempts to prevent, obstruct, impede, or interfere with, the due exercise of rights or the performance of duties under any order, judgment, or decree of a court of the United States, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

"No injunctive or other civil relief against the conduct made criminal by this section shall be denied on the ground that such conduct is a crime." Added,

Pub. L. 86-449, Title I, § 101, May 6, 1960, 74 Stat. 86. Other pertinent but omitted constitutional provisions, statutes and rules are set forth in the appendix.

### **STATEMENT OF THE CASE**

Rule 28 of this Court requires a Court of Appeals certifying a question to state in its certificate the facts on

---

2. Emphasis in quotations is supplied unless otherwise indicated.

which such question or proposition of law arises. This the Court of Appeals for the Fifth Circuit did in twenty-one numbered paragraphs.<sup>3</sup> There are several omissions from their statement and one matter included as a "fact" by the Court to which the defendants take exception. Should any of these matters be considered material to making the correct answer to the question certified, then defendants would respectfully move this Honorable Court to require that the pertinent portions of the record be sent up for this Court's examination.

The first omission consists of the fact that on the 13th day of September, 1962, promptly after the order of Mr. Justice Black, terminating the conflict of orders within the 5th Circuit, was received by the District Court, that Court entered its injunction order in strict compliance with the several mandates of the Court of Appeals and Mr. Justice Black.<sup>4</sup> This District Court injunction more than encompassed every matter included within the various injunction orders of the Court of Appeals. Since its issuance, the District Court's injunction order has never been stayed, suspended or modified.

Paragraph 3 of the Court's statement of fact<sup>5</sup> contains the statement: "On September 18, 1962, this Court (Judges Brown, Wisdom and Bell), after first ascertaining from the District Court that it declined to enter an order in this form, entered its order allowing the United States to appear in the case." It may well be that some type of private

---

3. (C. 2-36.)

4. See Appendix, pages A56 through A59, of the Petition for Writ of Certiorari to this Court in *Mississippi et al. v. Meredith, etc.*, Cause No. 661, October, 1962, Term.

5. (C. 5.)

communication took place between some person or persons to support this assertion of fact; however, the entire record in *Meredith v. Fair* and the subsequent criminal proceedings against these defendants fail to show any record evidence as to how this "ascertaining" was done. If this "ascertaining" is, as the Prosecution claims, sufficient to form part of the justification for the extraordinary use of an Appellate Court to perform a normal and ordinary function of a Court of original jurisdiction and thereby create an option in the prosecution to deny Defendants their basic constitutional right to trial by jury, it certainly ought to rise to the dignity of being reflected in the official record of the proceedings.<sup>6</sup>

The Statement of Facts also omits that on the same day, September 25, 1962, and at the same hour, 8:30 A.M., that the so-called "Amicus Curiae" obtained a Temporary Restraining Order<sup>7</sup> the only real party in the proceeding, Meredith, also obtained a Temporary Restraining Order enjoining the Defendant, Governor Barnett, from "doing any act calculated to or which does interfere with the admission, registration or attendance of appellant (Meredith) at the University of Mississippi."<sup>8</sup>

The order of November 15, 1962,<sup>9</sup> ordering the Prosecution to institute Criminal Contempt proceedings against the Defendants also stated that it appeared that "maximum procedural protection" would be afforded by the criminal proceedings demanded, which were required by the order

6. Cf. Judge Gewin's reference to this telephone "record". (C. 138.)

7. (C. 13.)

8. Appendix to Petition in Cause No. 661, Page A31.

9. (C. 31.)

to be brought under Rule 42(b) of the Federal Rules of Criminal Procedure. The order did not specify that the prosecutions were to be brought in the Court of Appeals.

The prosecution in its "Statement" and "Argument" devotes over one-fourth of its brief to a play upon the facts already delineated by the Court. Defendants respectfully submit that this is no more than a thinly veiled attempt to divert the Court's attention from the basic constitutional and statutory issues presented by the question certified. We particularly call to this Court's attention the erroneous statement that the District Court declined to enter an injunction order until after Meredith's "scheduled enrollment under the mandate of the Court of Appeals"<sup>10</sup> or "after the date for admission had passed".<sup>11</sup> The Court of Appeals mandate fixed no date for admission or scheduled enrollment. The period from September 20th through 24th, 1962, was designated for registration of new students for the fall semester by the University's General Catalogue Bulletin issued the previous spring, which is a part of the record below.

The assertion, in Argument, that the prosecution did not purposively by-pass the District Court<sup>12</sup> is positively denied, as is their additional extra-record statement that the District Court declined to enter appropriate decrees.<sup>13</sup> The Court of Appeals did not *intervene* "after long forbearance"<sup>14</sup> or otherwise. The record clearly shows that the prosecution *invoked* every proceeding taken by the Court of Appeals before criminal contempt. The record

---

10. Brief, p. 7.

11. *Ibid.*

12. Brief, p. 33.

13. *Ibid.*

14. *Ibid.*

clearly shows also that every action requested of the District Court by the private party litigant and the prosecution was promptly and correctly acted upon by that court. The Prosecutors sought out the Court of Appeals as a source of orders, duplicating in every material aspect, orders obtained by the real party in interest. These are the indisputable facts. Whatever inferences are to be drawn therefrom are for this Court to draw.

## ARGUMENT

### POINT I

#### **The Constitution of the United States Guarantees the Right to Trial by Jury in All Cases of Criminal Contempt**

In the case of *Gilbert Green et al. v. United States*<sup>15</sup> this Court very thoroughly considered this proposition, and Defendants do not propose in this brief to "haul coals to Newcastle". With the utmost deference, we are convinced that the dissent of Mr. Justice Black, in which the Chief Justice of the United States and Mr. Justice Douglas concurred, is the better reasoned opinion and should now be adopted by this Court as the controlling rule.

For the Court's convenience, we have here attempted to paraphrase and condense this opinion, without including its copious authority and precedent:

Criminal contempts provide a striking example of how the great procedural safeguards erected by the Bill of Rights are now easily evaded by the ever-ready and boundless expedients of a judicial decree and a summary contempt proceeding.

---

15. 356 U.S. 165.

Previous cases denying the right to trial by jury are *wrong—wholly wrong*. Courts are not omniscient. They too can profit from trial and error. This Court has a special responsibility to review its decisions in the field of constitutional law and to refuse to follow erroneous precedents. Early precedents have now been proven to be based on unfounded assumptions. Later cases merely cite the earlier ones. In this area there is no excuse for the *perpetuation of past errors*.

The majority's requirements that punishment for contempt be "reasonable" is a *trifling amelioration*.

The Courts have failed to make the proper distinction between conditional confinement to compel future performance and unconditional imprisonment designed to punish past acts.

Summary trial of criminal contempt allow a single functionary of the state, a Judge, to lay down the law, to prosecute, to sit in judgment, and then within the broadest kind of bounds to punish as he sees fit. This is inconsistent with the most rudimentary principles of our system of criminal justice and *vests such functionaries with autocratic omnipotence*.

The Constitution obviously resulted from a determination to *fragment power* along different departments and institutions of government so that each would tend to operate as a *check on excesses* of any other. The Founding Fathers should have known that when they put the responsibilities of lawmaker, prosecutor, judge, jury and disciplinarian on a single man, he would be incapable of holding the scales of justice perfectly fair and true. Any defendant before him would be denied an objective, scrupulously impartial tribunal. Our system of laws has always endeavored to prevent even the possibility of unfairness.

○ The offense of criminal contempt has the most ill-defined and elastic contours in our law, yet it is punished by the harshest procedures known to that law. Appellate review cannot begin to take the place of a proper trial. The only limits on punishment are now whatever remote restrictions exist in the Eighth Amendment's prohibition against cruel and unusual punishments or in the nebulous requirements of reasonableness. This is precisely the kind of arbitrary and dangerous power which our forefathers fought to stamp out. It is a paradox that it finds perpetuation in the courts.

○ Criminal contempt is manifestly a crime by every relevant test of reason or history.

The myth that criminal contempts have been summarily tried since time immemorial has been exploded by recent scholarship.

In the beginning arbitrary summary contempt was a petty, insignificant part of our law involving the use of trivial penalties to preserve order in the courtroom. But it has undergone an incredible transformation and growth. It is no longer the same comparatively innocuous power. It now finds important and far-reaching authorization for use in many fields of law through special statutory enactments. This power is utterly irreconcilable with the first principles of our system of government.

In the colonies trial by a jury of twelve laymen and no less was regarded as the birthright of free men. The simplest and most obvious interpretation of a constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption. It is beyond comprehension how a layman could see any appreciable difference between the crime of contempt and other major crimes. Blackstone

openly classified contempt as a crime, but regardless of proof of colonial thinking, our courts and Bill of Rights were not designed to perpetuate every *arbitrary and oppressive governmental practice* then tolerated in England.

Stark necessity is an impressive and often compelling thing, but is too often claimed loosely and without warrant in the law, as elsewhere, to justify that which in truth is unjustifiable. Closely examined the "necessity" argument states that trials conducted in accordance with the Bill of Rights will not result in conviction and punishment of a fair share of those charged. It is undoubtedly true that a judge can dispose of charges of criminal contempt faster and cheaper than a jury, but *cheap, easy convictions were not the primary concern of those who adopted the Constitution and Bill of Rights*. In the long run due respect for the courts and their mandates would be much more likely if they faithfully observed the procedures laid down by our nationally acclaimed charter of liberty, the Bill of Rights. The classic example of this is the use and abuse of the injunction and summary contempt power in the labor field.

*Crimes of contempt ought to be required to be punished under the Constitution just as all other crimes*. Unfortunately judges and lawyers have told each other the contrary so often that they have come to accept it as the gospel truth.\*

There are some areas of the discussion had there which we believe our additional research may illumine. There is also a fundamental difference in factual context between this case and the *Green* case. That difference

---

\*For ease of reference, this entire opinion is appended to this brief, p. A3.

is that on May 6, 1960, the Congress enacted a statute defining obstruction of court orders as a crime.<sup>16</sup> The acts which caused *Green's* convictions were not, at the time committed, proscribed by criminal statute.

## A

### Historical Data

History teaches that juries were originated by William the Conqueror. They were not originally instruments of freedom, but tools of oppression used to assure the Monarch that the "dooms" which these jurors pronounced on their neighbors in each manor would include all of that man's taxable land and property. They were the source of the Domesday Book of 1086.<sup>17</sup>

The right to trial by a jury of one's peers is rooted in antiquity. This is borne out by the words of Mr. Justice Harlan in 1898:

"When Magna Charta declared that no freeman should be deprived of life, etc., 'but by the judgment of his peers or by the law of the land,' it referred to a trial by twelve jurors. Those who emigrated to this country from England brought with them this great privilege 'as their birthright and inheritance, as a part of that admirable common law' which had fenced around and interposed barriers on every side against the approaches of arbitrary power. '2 Story, Const. §1779. In Bac. Abr. tit. 'Juries' it is said: The trial per pais, or by a jury of one's country, is justly esteemed one of the principal excellencies of our constitution, for what greater security can any person have in his life, liberty, or estate than to be sure of not being

---

16, 18 U.S.C. 1509.

17. • Sources of Our Liberties, Perry, Am. Bar Found., 3; Encyclopedia Britannica. See heading "Domesday Book".

devested of nor injured in any of these without the sense and verdict of twelve honest and impartial men of his neighborhood? And hence we find the common law herein confirmed by Magna Charta.' So, in 1 Hale, P.C. 33: 'The law of England hath afforded the best method of trial that is possible of this and all other matters of fact, namely, by a jury of twelve men all concurring in the same judgment.'<sup>18</sup>

One of the greatest victories in the struggle to preserve the jury system occurred in 1670 when the Quaker, William Penn, was acquitted of a charge of disturbing the peace by a jury, the members of which found themselves immediately fined and imprisoned by a judge who did not want the Crown to be denied the conviction it demanded. On appeal to the Court of Common Pleas the stalwart judges of that court unanimously voted to free the jurors.<sup>19</sup>

In the time of the Stuart kings when most of the colonies were established, jury panels were used, but they were hand picked to bring in the verdict desired by those in power.<sup>20</sup>

As encouragement to settle the new colonies, stipulations were made by the Crown that among the liberties the colonists would enjoy was the right to trial by jury.<sup>21</sup> Later King George III, to increase the revenue potential of the colonies, commenced a program of vigorous taxation including the odious Stamp Act of 1765. The King's Ministers entertained the same fear that has led to burgeoning use of criminal contempt in this country—that a jury system would not result in "adequate" enforcement

---

18. *Thompson v. Utah*, 170 U.S. 343.

19. *Concise History of the Common Law*, 5th Ed., Plucknett, page 134; *Almanac of Liberty*, Douglas, pages 86-88, 149.

20. *Almanac of Liberty*, *supra*, page 195.

21. *Sources of Our Liberty*, *supra*.

of unpopular laws. Hence, enforcement of the Stamp Taxes was placed in the hands of the Admiralty Courts and right of trial by jury was denied. This action was, in large part, the leaven which raised the colonists to the War of the Revolution.

Long before this revolution, this *principal excellency*, the right to trial by jury, was embodied in the Declaration of Rights in nine of the thirteen colonies in these words:

"That trial by jury is the inherent and invaluable right of every British subject of these colonies."<sup>22</sup>

When, "in the course of human events" it became necessary for them to dissolve their bonds connecting them with England, they specifically listed in that great document of July 4, 1776, the grievance: "For depriving us in many cases of the benefits of trial by jury".

Within a month after the Declaration of Independence most of the new states adopted constitutions guaranteeing jury trials in criminal and civil cases.<sup>23</sup>

In the making of the Constitution and the birth of the Bill of Rights, the right of trial by jury was the only procedural right which received a *triple guarantee*.<sup>24</sup>

With only the Constitution in hand, if one were asked if those who wrote the Constitution had a high regard for the institution of trial by jury, the questioner need only be asked to look around him. With deference, we submit that with the light of history illuminating these eternal principles of rational freedom, there can be no doubt that the blood,

22. 43 *Harvard Classics*, 147.

23. *Sources of Our Liberties*, page 323 et seq. See also 39 *Harvard Law Review* 917, 968, 974.

24. Article III, Section 2, Clause 3, *Sixth Amendment*, *Seventh Amendment*; not to mention the right of grand jury indictment established by the *Fifth Amendment*.

sweat and tears of our forefathers was shed in abundant measure to secure to themselves and their posterity the right of trial by jury.

## B

**Substantive Due Process Requires That 18 U.S.C. 1505 Be Interpreted to Transpose Criminal Contempt Jurisdiction Included Therein into Federal Criminal Law**

Obviously, if the conduct charged in this criminal contempt proceeding were proven, these acts would be a precise violation of the obstruction of the court order statute. The legislative history of this statute makes it clear that one principal reason for its enactment was to deal with the precise situation claimed to exist here.<sup>1</sup>

It is a firmly entrenched ruling of this Court that courts of the United States possess no common law criminal jurisdiction. They have only the power to punish such crimes as are defined by Congress.<sup>2</sup> Defendants stand accused of a contempt of court by an alleged act which is now clearly defined as a crime by the Congress and is punishable by indictment by a constitutional Grand Jury and trial by a constitutional Petit Jury in accord with all of the normal constitutional safeguards surrounding Federal Criminal procedure. The right of trial by jury is one such safeguard that has never been lightly regarded.<sup>3</sup>

1. 60 U.S. Code Cong. and Adm. News, p. 1942 (Cf. p. 1961) and Hearings before Subcommittee on Constitutional Rights of the Judiciary Committee of U. S. Senate, 86th Congress, 1st Session 1959, pp. 186-189.

2. *U. S. v. Hudson and Goodwin*, 7 Cranch 32; *U. S. v. Hall*, 98 U.S. 343.

3. Blackstone called it "The glory of the English Law". 3 Comm. 379. In *Van Horne's Lessee v. Dorrance*, 2 Dallas 304, 309, decided 4 years after the Federal Bill of Rights was ratified, the U. S. Circuit Court of the District of Pennsylvania, referring to

The right of these defendants to have the full benefit of this safeguard cannot constitutionally be abridged by the mere choice of courts or proceedings by the prosecution or by an "offended" Court's choice to have these defendants summarily tried before it without these safeguards. Such an optional and uneven method of proceeding would clearly violate the due process clause of the 5th Amendment. In *Griffin v. People of the State of Illinois*,<sup>4</sup> this Court, speaking through Mr. Justice Black, the Chief Justice and Justices Douglas and Clark, said:

"Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal. This hope, at least in part, brought about

---

§9 of the Pennsylvania Bill of Rights, which is thought to have influenced Madison's draft of the 6th Amendment, said: "If the Legislature had passed an act declaring, that, in future, there should be no trial by Jury, would it have been obligatory? No. It would have been void for want of jurisdiction, or constitutional extent of power. The right of trial by Jury is a fundamental law, made sacred by the Constitution, and cannot be legislated away."

Compare this Court's language in *Ex parte Milligan*, 4 Wall. 2, 123 (1886): "The sixth amendment affirms that 'in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury,' language broad enough to embrace all persons and cases"; and the words of Justice Story: "When our more immediate ancestors removed to America, they brought this great privilege (trial by jury in criminal cases) with them, as their birthright and inheritance, as a part of that admirable common law which had fenced round and interposed barriers on every side against the approaches of arbitrary power. It is now incorporated into all our state constitutions as a fundamental right, and the Constitution of the United States would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms." 2 Story, *Const.*, Sec. 1779.

4. 351 U.S. 12, 16.

in 1215 the royal concessions of Magna Charta: "To no one will we sell, to no one will we refuse, or delay, right or justice. \* \* \* No free man shall be taken or imprisoned, or disseised, or outlawed, or exiled, or anywise destroyed; nor shall we go upon him nor send upon him, but by the lawful judgment of his peers or by the law of the land." These pledges were unquestionably steps toward a fairer and more nearly equal application of criminal justice. In this tradition, our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.' *Chambers v. Florida*, 309 U.S. 227, 241, 60 S. Ct. 472, 479, 84 L. Ed. 716."<sup>5</sup>

If, for precisely the same act, one man can be tried by a jury under the statute only after indictment while another may be attached to appear for summary trial before the court whose order he allegedly disobeyed, the obvious result is a critical lack of equality before the bar of justice which is a violation of due process. This erroneous result can only be avoided by recognizing that Congress intended to preempt the action described in the criminal statute from the field of contempt and to require courts to process such actions in the regular constitutional manner in which all crimes are tried.

Under the aegis of "Due Process", this court has gradually built for itself a set of acceptable limitations on

---

5. It is interesting to note that in concurring Mr. Justice Frankfurter classified capital offenses as "*sui generis*"—the term often applied to criminal contempt to modulate its constitutional status. 351 U.S. 21.

the exercise of criminal contempt power in cases of the category here presented. These required procedural devices are:

- (1) The accused is presumed innocent, proof of guilt beyond a reasonable doubt is required, and the accused cannot be compelled to testify against himself.<sup>6</sup>
- (2) The accused is entitled to advice as to the charges against him, a reasonable opportunity to prepare a defense, the benefit of compulsory process, and the assistance of counsel.<sup>7</sup>
- (3) The accused is entitled to an impartial arbiter of fact.<sup>8</sup>
- (4) The accused is entitled to a public trial.<sup>9</sup>
- (5) The accused is entitled to the benefit of a statute of limitations governing crimes.<sup>10</sup>
- (6) The sentence imposed must be "reasonable".<sup>11</sup>
- (7) A person convicted of criminal contempt is entitled to be admitted to bail.<sup>12</sup>
- (8) A person convicted of criminal contempt may be pardoned by the President under the President's constitutional authority to pardon "criminal offenses."<sup>13</sup>

---

6. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418.

7. *Cooke v. U. S.*, 267 U.S. 517.

8. *In re Murchison*, 349 U.S. 133.

9. *In re Oliver*, 333 U.S. 257.

10. *Gompers v. U. S.*, 233 U.S. 604.

11. *Green v. U. S.*, *supra*.

12. Rules 42(b) and 46, *Federal Rules of Criminal Procedure*.

13. *Ex parte Grossman*, 267 U.S. 87.

Cf. *Wood v. Georgia*, 368 U.S. 894. A criminal contempt proceeding cannot be conducted by a state court where the result

The only constitutional procedural guarantees still omitted are indictment by a Grand Jury, the right to a speedy trial by an impartial jury, and the prohibition against double jeopardy. No question has yet been raised in this court as to venue,<sup>14</sup> which may become an issue in this case. The Court's reasoning is that these restraints are required by the due process clause of the 5th Amendment<sup>15</sup> and are commensurate with the exercise of "the least possible power adequate to the end proposed."<sup>16</sup>

While a majority of this Court has held that a proper construction of the Constitution permitted the power to be implied around that document into the Federal Courts to summarily deal with crimes of contempt, it has inconsistently but continuously recognized the power of Congress to limit these "inherent" contempt procedures,<sup>17</sup> and in this case the obstruction of court orders statute defines an area which Congress has withdrawn from the exercise of criminal contempt. The result reached by such a holding has been previously urged by respectable authority.<sup>18</sup>

The Court's holding in *Ex Parte Savin*<sup>19</sup> is not to the

---

is to abridge the constitutional guaranty of free speech, and *Deutch v. U. S.*, 367 U.S. 456. Contempts of Congress are processed and punished as other crimes.

14. See *Houston & N. Texas Motor Freight Lines, Inc., v. Local 745*, (N.D. Tex.) 27 F. Supp. 145.

15. *Levine v. U. S.*, 362 U.S. 610, 616.

16. *Anderson v. Dunn*, 6 Wheat. 204.

17. *Ex parte Robinson*, 19 Wall. 505; cf. *Michaelson v. U. S.*, 266 U.S. 42, and *In re McConnell*, 370 U.S. 230.

18. *Works of Edward Livingston*.

Cf. *Contempt of Court, Criminal and Civil*, Joseph H. Beale, Jr., 21 Harv. L. Rev. 161.

19. 131 U.S. 267.

contrary.<sup>20</sup> Rather, it supports the position here urged. The statute<sup>21</sup> there considered did not create and define a crime, but rather it contained a definition of permissible areas of contempt jurisdiction, and, of course, it did not contain any provision similar to §1509, saving out of the statute's ambit only civil relief against the conduct specified as criminal.<sup>22</sup> Neither does *Savin* give any consideration to the point made in *Griffin*, *supra*. The Court may also wish to consider the fact that §1509 was enacted in full hindsight of *Griffin*'s teaching.

Of course, no one would contend that companion criminal statutes and rules do not preserve to every court the right to summarily deal with contempts committed in its presence.<sup>23</sup>

---

20. Cf. Judge Cameron's remarks in his separate opinion and his reference to *Nye v. U. S.*, 313 U.S. 33. (c. 94.)

21. Act of Mar. 2, 1831, c. 99; 4 St. 487; Recodified by the revisor as §§ 725 and 5399 of Rev. St. While the revised statutes were authorized by Congress, they were not official. They were *prima facie* evidence of already existing law. Cong. Rec., 45th Cong., 2nd Sess., pp. 1376, 7. The court may be interested to note that in rescripting § 725 the revisor omitted the crucial word "summary". Its omission has passed unnoticed until now except in *Savin*, *supra*, where the court simply affirmed the summary power to proceed as to contempts in the presence of the court or so near thereto as to obstruct the administration of justice, which was not proscribed by the Act of Mar. 2, 1831, anyway. [*Savin* involved an attempted bribe of a witness in a room adjoining open court. (Physical nearness did not become an issue until *Nye v. U. S.*, 313 U.S. 33.) In *re Terry*, 128 U.S. 289, cited in *Savin*, involved an assault on a marshal in open court.]

22. This is another distinction from the *Green* case. The Jumping Bail statute there involved expressly reserved power to "punish" the same act as contempt—a purely criminal function. 356 U.S. 173.

23. Federal Rules of Criminal Procedure, Rule 42(a); 18 U.S.C., § 1995 (Voting Rights), § 3691 (Anti-Trust), and § 3692 (Labor Disputes).

Another very important aspect of Constitutional Due Process is embodied in the suggestion of Judge Bell of the Court of Appeals for the Fifth Circuit in which he indicated that the court should have certified an additional question which is, we submit with all due respect, implicit in the question presented; namely, whether or not this court should require these proceedings to be tried before a District Court.

In *In re Murchison*,<sup>24</sup> this Court said:

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'Every procedure which would offer a possible temptation to the average man as a judge \* \* \* not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.' *Turney v. State of Ohio*, 273 U.S. 510, 532, 47 S. Ct. 437, 444, 71 L. Ed. 749. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.

"It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations."

The Court's attention is further directed to two pertinent provisions of Title 28, *United States Code*:

---

24. *Supra*, p. 17.

Section 144 gives any party the right to file a timely affidavit that the District Judge before whom the matter is pending has a personal bias or prejudice. Upon the filing of this affidavit the Judge must immediately refer the matter to another Judge for hearing. This statute affects only District Courts.<sup>25</sup>

Section 455 of the same title is the only statute applicable to appellate judges. It provides that the judge shall disqualify himself in any case where "in his opinion" he has a "substantial interest".

In *Adams v. United States*<sup>26</sup> the Fifth Circuit held that the words "substantial interest" in §455 meant a pecuniary or beneficial interest or an interest equal to a lawyer pursuing litigation in behalf of his client. They there expressly approved of the conduct of a trial by a judge who had acted as the prosecutor at the time of the indictment.<sup>27</sup>

We submit the disparity between remedies available to question the open-mindedness of the prospective trial judges in a regular trial court as opposed to the appellate tribunal here involved intensifies the lack of procedural due process available to these defendants.

To answer the prophets of doom who say that the "efficiency" and effectiveness of the Court would be im-

25. *Kinney v. Plymouth Rock Squab Co.*, (1st Cir.) 213 Fed. 449; *Millslagle v. Olson*, (8th Cir.) 128 F.2d 1015; *Duke v. Committee, etc.*, (D.C. Cir.) 82 F.2d 890; Cf. *Ryan v. U. S.*, (8th Cir.) 99 F.2d 884, 871.

26. 302 F.2d 307.

27. Cf. The changes made in the new uniform code of military justice which require all but petty prosecutions to proceed before a court convened by a person of superior rank to the accuser at whose instance the charges were brought. 10 U.S.C., §§ 822, 823.

paired if these views be adopted here, we would recall Mr. Justice Black's analytical reminder that the only subject dealt with here is criminal contempt—that species of the contempt power which concerns itself with *punishment* for a past wrong for the purpose of seeking vindication and preventing similar misdeeds in the future.<sup>28</sup> Every remedial civil power to preserve order and secure rights adjudicated would remain unimpaired; only the Defendants' fundamental due of basic constitutional procedural guarantees are here asserted.

## C

### The Court's Decision in *Green v. U. S.* Should Be Reversed

At the outset of this discussion, it seems appropriate to note that no greater compliment to the logic and persuasiveness of the constitutional dissent in the *Green* case could be tendered than has been paid by the Brief for the United States. It devotes half its argument and the citation of 75 cases to an attempt to persuade the Court not to adopt this position.

The prosecution admits that a consideration of criminal contempt procedures by the Founding Fathers cannot be historically authenticated.<sup>1</sup> The Constitution's only expressed exception to the guarantee of jury trial in criminal cases was "in cases of impeachment", which is certainly a

---

<sup>28</sup> This distinction between civil and criminal contempt proceedings has caused confusion, as witness Mr. Justice Brewer's words in *in re Debs*, 158 U.S. 564, 596; which resulted in fixed prison terms for the defendants:

"In brief, a court enforcing obedience to its orders by proceedings for contempt, is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudged them entitled to."

Cf. *Gompers v. Buck's Stove and Range Co.*, 221 U.S. 418.

1. Brief, p. 49.

proceeding that is *sui generis*, and uniquely extra-judicial.<sup>2</sup> If usual rules of interpretation are applied, expressing a single specific exclusion creates a stronger presumption that no other exceptions were intended than would have been present if no exception whatsoever had been made.<sup>3</sup> History assures us that the words of Art. III, Section 2, Clause 3, met with immediate dissatisfaction in the new Union. It also teaches that the Bill of Rights had a purpose of specifically defining the scope and nature of trial by jury. The explicit guarantee of that right was one purpose intended. The people thought so much of it that they wanted the right of trial by jury well defined. Criminal contempts were not in any way excluded from this safeguard and should not be read out by implication.<sup>4</sup>

It is difficult to comprehend the logic of those who argue that a thoroughly discredited and an uncertain historical background have combined to justify a strained construction of the normal import of words used by those who had so recently passed from under the heel of an oppressive monarch whom they criticized for depriving them of the right to trial by jury in their Declaration of Independence.<sup>5</sup>

---

2. However, the extent of punishment which can be imposed is fixed rather than unlimited." Article I, Sec. 3, Cl. 7.

3. Cf. *Pine Grove Township v. Talcott*, 19 Wall. (86 U.S.) 666, "The case as to the Constitution (of Michigan) is a proper one for the application of the maxim, *Expressio unius est exclusio alterius*."

4. *U. S. v. Classic*, 313 U. S. 299, 316. "If we remember that 'it is a constitution we are expounding', we cannot rightly prefer, of the possible meanings of its words, that which will defeat rather than effectuate the constitutional purpose."

5. Lesser, *History of the Jury System*, 151. It may well be that the majority opinion places undue reliance on the colonial impact of one portion of Blackstone's work, since Blackstone

Giving even honors to the contentions that history establishes, and on the other hand, fails to establish, the use of summary procedures in criminal contempt in English courts after the abolition of the infamous Star Chamber, we can only find that history proves that the Federal convention was as silent on the precise subject as is the Constitution itself.

The prosecution turns to the stirring words of the Federalist on preserving the benefits of an impartial judiciary, but the Court knows that this very Hamilton struck equally stirring phrases in favor of trial by jury.<sup>6</sup>

The majority opinion in the *Green* case also advances the assurance that the contempt power is subject to judi-

---

also commented that summary procedure was "not agreeable to the genius of the Common Law in any other instance." 4 *Rl. Comm.*, c. 20, §2. Consider also the further observation of the commentator in 57 *Mich. L. Rev.* 258, 261: "It is at least conceivable that this last phrase had an even greater influence on colonial lawyers than Blackstone's statement of the *Almon* doctrine. Moreover, the views of some of the other authorities available to the colonials should perhaps be considered. For example, a widely-used law dictionary said that the summary nature of an 'attachment' for contempt would be contrary to the jury trial provision in Magna Charta, and 'must be for a contempt in the face of the court' or else for a contempt committed by officers of the court." (*Jacob's Law Dictionary*, 9th Ed. (1772), cited in Fox, *The History of Contempt of Court*, 38 (1927).)

6. "The more the operation of the institution (of trial by jury) has fallen under my observation, the more reason I have discovered for holding it in high estimation." *The Federalist*, No. LXXXIII, Lodge Ed., 521.

"Arbitrary impeachments, arbitrary methods of prosecuting pretended offences, and arbitrary punishments upon arbitrary convictions, have ever appeared to me to be the great engines of judicial despotism . . . The trial by jury in criminal cases," therefore, "is provided for." *The Federalist*, No. LXXXVIII, Lodge Ed., 521.

cial review—an assurance which Mr. Justice Black characterizes as a “trifling amelioration”.<sup>7</sup> In the present case even that characterization might be subject to considerable scepticism.

This proceeding is now before a Circuit Court of Appeals. The statutes provide the defendants with no right of appeal. They only have permission to apply to this Court for a Writ of Certiorari.<sup>8</sup> As to the basic issue of guilt or innocence of contempt, the question presented would be one of fact which this Court has consistently refused to review.<sup>9</sup> The only question “review” covers is the amount of the punishment inflicted.

The reasoning is advanced by the majority opinion in *Green* that a summary trial is “necessary”. The prosecution devotes the principal portion of its constitutional argument to this “need power”. It speaks of the dangers that a single juror lacking sympathy with the underlying order could render the order “ineffective”.<sup>10</sup> This argument condemns and would abolish the constitutional principle of trial by jury in every case. The assertion ignores the very purpose of criminal contempt, which is not to coerce enforcement but to punish disobedience. *The orders alleged to have been violated here have long ago met with full compliance; in fact, the litigant has now graduated. The*

7. 356 U.S. 197.

8. Discretionary review was substituted for writ of error by 26 Stat. 826. Also Cf. Mr. Chief Justice Taft's concurring opinion in *Craig v. Hecht*, 263 U.S. 255, 278, 9. The review is of right in a Court of Appeals. In this Court a defendant has only the opportunity “to apply” for review.

9. *Bessette v. W. B. Conkey Co.*, 194 U.S. 324; *In re Terry*, 129 U.S. 289; *In re Debs*, 158 U.S. 564.

10. Brief, p. 48.

purpose of these criminal proceedings is to determine the propriety of imposing a purely penal sanction for past action.

The prosecution brief further talks of a jury trial embarrassing and retarding the business of the courts. Which of the guarantees in our Constitution won't embarrass and retard those autocratic acts which make Government by a despot simple and expedient (in the despot's view, at least)? Our prosecutors do not heed de Tocqueville, who admonished against confusing the familiar with the necessary. Compare Mr. Justice Moody's apt words:<sup>11</sup>

"It does not follow, however, that a procedure settled in English law at the time of the emigration, and brought to this country and practised by our ancestors, is an essential element of due process of law. If that were so, the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a straight jacket, only to be unloosed by constitutional amendment. That, said Mr. Justice Matthews, in the same case, p. 529, 'would be to deny every quality of the law but its age, and to render it incapable of progress or improvement.' *Holden v. Hardy*, 169 U.S. 366, 388, 42 L. Ed. 780, 789, 18 Sup. Ct. Rep. 383."

Certainly the most convincing argument against continuing to allow extra-constitutional summary punishments of contempts on the justification of this so-called "need power" is found in Circuit Judge Caldwell's dissenting remarks in *Hopkins v. Orley Stave Co.*<sup>12</sup> sixty-five years ago:

"But the logical difficulty with this reasoning is that it confers jurisdiction on the mob equally with

---

11. *Twining et al. v. New Jersey*, 211 U.S. 78.

12. 83 Fed. 912.

the Chancellor. *Those who justify or excuse mob law do it upon the ground that the administration of criminal justice is slow and expensive, and the results sometimes unsatisfactory. It can make little difference to the victims of short-cut and unconstitutional methods whether it is the mob or the Chancellor that deprives them of their constitutional rights."*

If Judge Caldwell's reasoning still be deemed insufficient, we urge the Court to consider its holding in *In re Debs*,<sup>13</sup> before the rationale of that case was terminated by statute.<sup>14</sup> In the early 1890's the railroad barons had acquired an inordinate economic power over their employees. Any man who dared speak out against management practices, work hour or wages was dismissed and black-listed. Such unions as there were, were so small and jealous of the individual craft they represented that they were totally ineffective as bargaining agents. Eugene Debs was a principal organizer of the American Railway Union which attempted to band together several of the independent unions to achieve a more workable bargaining position. His union staged one successful strike against one of the larger railroad companies and was fast gaining in popularity. The Pullman Palace Car Company, which in those times was still controlled by its dominating Founder, chose to cut the wages of its employees without making any provisions for relief to the employees covering house rents and food stuffs. (Almost all Pullman employees lived in company-owned houses and purchased their furnish from company-owned stores). Debs' union called a strike against every railroad operating Pullman cars to force Pullman to make an adjustment to relieve the employees' economic squeeze.

13. 158 U.S. 564.

14. 18 U.S.C. 3692.

In several areas where the actions of the Pullman Company were the subject of widespread public resentment, great hordes of people joined the striking American Railway Union. Through Pullman's influence on state and national leaders, members of the National Guard and troops of the United States were used for strike breaking purposes. Property damage and personal injury resulted. When this course was not fully effective the Federal Government secured an injunction from the United States District Court against the maintenance of the strike. Debs refused to abandon his position. The Court in a summary proceeding, cited, tried, convicted and imprisoned Debs and his principal lieutenants. The strikers were demoralized, the strike was broken and Pullman's domination was reinstated.

But for the intervention of Congress, such a practice could have still been continued in labor disputes to this day. It is not hard to imagine that labor's voice in this country would be little heard and less heeded if such practices had been allowed to continue.

*The basis for the Debs decision was necessity and "efficiency".<sup>15</sup>*

In this present case, in the face of a positive statutory enactment making obstruction of court orders a Federal crime, we have the anomalous situation of the prosecution by-passing a court of original jurisdiction (whose then pending injunction was, if their criminal information charges be proven, as threatened with obstruction as was the mandate—"injunction" of the Court of Appeals) and seeking from the appellate court a writ to prohibit conduct which a statute had already criminally proscribed.

---

15. 158 U.S. 595.

"The courts of America, and especially the federal courts, have shown a disposition to extend their powers beyond any limits heretofore recognized. In seeking to restrain acts in their nature purely criminal, and punishing by summary proceedings for contempt persons accused of committing those acts, they have been charged with usurping the functions of the criminal law; in seeking to restrain all persons, whether parties to the suit or not, and whether identified or not, they have been charged with issuing decrees legislative rather than judicial."

"It is not one of the functions of a court of equity to prevent the commission of threatened crimes."

"... an injunction against ... an ... overt breach of the peace can have no tendency to prevent the act enjoined except by fear of punishment. That sanction the law already attaches to its prohibition of the same act, and whatever will justify punishment for contempt in such a case will equally justify punishment for the criminal act which constitutes the contempt."

These words were not written about the case of *Meredith v. Fair*, nor were they written in the year 1963. They are the words of William H. Dunbar of Boston, Massachusetts published in October of 1897 in his scholarly comment on the case of *In re Debs*.<sup>16</sup> We respectfully submit they could have been no less apropos had they been written with this case and this day in mind. The Court also knows that one of the great maxims of equity is *equitas sequitur legem*—equity follows the law. Equity does not intrude in matters plainly and fully covered by statute.<sup>17</sup>

16. "Government by Injunction," 18 Law Q. Rev. 347.

17. *Magniac v. Thompson*, 56 U.S. 281; *Hedges v. Dixon County*, 150 U.S. 182.

Much reliance is placed by the majority opinion in *Green* as to the preciseness with which the terms "crime" and "criminal proceedings" were used in the Constitution.<sup>18</sup>

In considering the weight that is to be assigned to this assumption, without proof, that great attention was given to a precise selection of these words, we respectfully ask the Court to consider its own vagaries in this direction. In *Ex Parte Grossman*,<sup>19</sup> the Court held that conviction of criminal contempt was a criminal "offense" subject to the presidential pardon power. Yet, in *In re Debs* the Court expressly affirms permission for double jeopardy prosecutions for criminal contempts which are also statutory crimes. Thus we find that this Court has thoughtfully and deliberately classified a criminal contempt as an "offense" under one section of the Constitution and "not an offense" under another.<sup>20</sup>

Mr. Justice Black feels that there are no limits on the punishment a judge can impose in criminal contempt, except for the 8th Amendment's vague prohibition against cruel and unusual punishments. If even this is correct, it is difficult to logically understand how this prohibition can be successfully asserted if the court system on which the Constitution was based recognized no right to limit the sentence of a court vindicating its authority by way of criminal contempt. The Star Chamber, where the loss of right to trial by jury occurred and where summary criminal contempts originated, frequently indulged in such methods of contempt punishment as the rack and the screw.

18. 356 U.S. 186.

19. 267 U.S. 87.

20. Cf. *Gompers v. U. S.*, 233 U.S. 604, and *New Orleans v. New York Mail Steamship Co.*, 87 U.S. 387, 392.

Why is one constitutional protection lost and another saved? Or is it saved?<sup>21</sup>

While this Court has looked with inconclusive results to the practice of the courts of England and the colonies to support a deprivation of the right to trial by jury, it has since time immemorial been wedded to the proposition that a correct interpretation of the Constitution was to be found in the plain and ordinary meaning of the words used by the people themselves.<sup>22</sup> What plain ordinary man of today or yesteryear, given the Constitution to read, would find an exception to constitutional rights to be accorded one accused of criminal action in cases of criminal contempt? It has been said that the men who composed the convention were learned in law and conversant with English history,<sup>23</sup> but it must be remembered that they only proposed the document for ratification by the States. The more pertinent question would be the extent of eruditeness of those who cast the ballots which brought the document alive. Can anyone accurately characterize their knowledge? The learned discussions in the various state as-

---

21. Circuit Judge Vinson (later Chief Justice of the U. S.) observed in *Warring v. Huff*, 121 F.2d 641, "the contempt statute sets no maximum (punishment), not even an indefinite one such as life; the maximum is the non-arbitrary discretion of the trial judge." Previously in these proceedings the Court of Appeals disregarded the statutory limitation of "fine or imprisonment" in its civil contempt judgments and ordered that both fine and imprisonment be imposed. Appendix to Petition for Certiorari, Cause No. 661, pp. A38 and A41. This Court refused review. U.S. \_\_\_\_\_, 83 S.Ct. 722, Feb. 18, 1963.

Thirty of the fifty states have maximum penalties for criminal contempt fixed by statute. See Appendix B to Brief for Petitioners in *Green v. United States*, Cause No. 100, October Term, 1957

22. *Gibbons v. Ogden*, 9 Wheat 1.



## INDEX

Interest of the Amicus .....	1
------------------------------	---

### Argument—

I. This Action Is an Impermissible Suit by the United States Against the State of Mississippi .....	2
II. The Cause Should Be Dismissed As Moot .....	9

### CASES CITED

<i>Arizona Grocery Co. v. Atchison, T. &amp; S. F. R. Co.</i> , 284 U.S. 600, 76 L. ed. 515 .....	9
<i>California Co. v. State Oil &amp; Gas Board</i> , 200 Miss. 824, 27 So.2d 542 .....	9
<i>City of Meridian v. Southern Tel. &amp; Tel. Co.</i> , 358 U.S. 639, 3 L. ed. 2d 562 .....	9
<i>Collector v. Day</i> , 78 U.S. 113, 20 L. ed. 122 .....	6, 10
<i>Cunningham v. Neagle</i> , 135 U.S. 1, 34 L. ed. 85, 75 .....	8
<i>Fitts v. McGhee</i> , 172 U.S. 516, 43 L. ed. 535 .....	6
<i>Graves v. New York</i> , 306 U.S. 466, 83 L. ed. 927 .....	11
<i>Larson v. Domestic &amp; Foreign Commerce Corporation</i> , 337 U.S. 682, 696, 93 L. ed. 1628, 1639 .....	3
<i>Light, Heat &amp; Water Co. v. Jackson</i> , 73 Miss. 644, 19 So. 771 .....	9
<i>Malone v. Bowdoin</i> , 369 U.S. 643, 645, 8 L. ed. 2d 168, 170; 369 U.S. 650, 8 L. ed. 2d 173 .....	3, 6
<i>Sterling v. Constantin</i> , 287 U.S. 278, 77 L. ed. 375 .....	6
<i>Texas v. White</i> , 7 Wall. 700, 725, 19 L. ed. 227, 237 .....	11
<i>United States v. Mersky</i> , 361 U.S. 431, 4 L. ed. 2d 423 .....	9
<i>United States v. United Mine Workers</i> , 330 U.S. 258, 91 L. ed. 884 .....	10
<i>Vicksburg v. Vicksburg Waterworks Co.</i> , 206 U.S. 496, 51 L. ed. 1155 .....	9
<i>Williams v. Simons</i> , 355 U.S. 49, 2 L. ed. 2d 87, 92 .....	10



**IN THE  
SUPREME COURT OF THE UNITED STATES**

---

**OCTOBER TERM, 1963**

---

**No. 107**

---

**UNITED STATES OF AMERICA,**

**VS.**

**ROSS R. BARNETT, Governor of the State of Mississippi,  
and PAUL B. JOHNSON, JR., Lieutenant Governor  
of the State of Mississippi.**

---

**ON CERTIFICATE FROM THE UNITED STATES COURT OF  
APPEALS FOR THE FIFTH CIRCUIT.**

---

**BRIEF AMICUS CURIAE FOR THE STATE OF  
MISSISSIPPI**

---

**INTEREST OF THE AMICUS**

The Governor and the Lieutenant Governor of the State of Mississippi, acting pursuant to the requirements of the Constitution and the statutes of this State and in the discretionary discharge of their oaths of office, performed actions which this case calls into question. This action is an attack upon the sovereignty of the State of Mississippi.

The State of Mississippi has an additional interest in protecting its duly elected officials and in preserving peace, tranquillity and the orderly processes of government within its borders. The seizure of the State's duly elected executive officers by an assertion of superior sovereignty and contrary to the orderly processes of impeachment as made and provided by the laws of this state, would be nothing short of a disaster.

## ARGUMENT

### I

#### **This Action Is an Impermissible Suit by the United States Against the State of Mississippi**

1. In the argument of the Solicitor General, as the basic conception, he declares, p. 19:

"In this extraordinary case the defendants are charged with criminal contempt of a federal court order. Although the alleged contemnors are the Governor and Lieutenant Governor of a State, they stand before the bar on the same footing with other citizens. Just as the highest executive officials of a State are obligated to obey federal authority, *Cooper v. Aaron*, 358 U.S. 1, 18-19; *Sterling v. Constantin*, 287 U.S. 378, 397-398, so are they entitled, when charged with flouting that authority, to the same rights and privileges, no more and no less—as the law confers upon ordinary citizens."

With deference, the standing of individual citizens before the Constitution is not now in issue and this declaration is a begging of the basic question. The authority whereon the Solicitor General relies is thus stated, p. 55:

"\* \* \* Certainly, the high office of the defendants in this case gives no occasion to fashion a special rule.

**"No man in this country is so high that he is above the law. No officer of the law may set the law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." United States v. Lee, 106 U.S. 196, 220."**

That quoted represented the then majority opinion but note:

(a) This was a five to four decision, the four dissenters being the Chief Justice, Mr. Justice Bradley, Mr. Justice Woods and Mr. Justice Gray.

(b) (1) *Larson v. Domestic & Foreign Commerce Corporation*, 337 U.S. 682, 696, 93 L. ed. 1628, 1639:

**"United States v. Lee, 106 U.S. 196, 27 L. ed. 171, 1 S. Ct. 240 (1882), is said to have established the rule for which the respondent contends. It did not. It represents, rather, a specific application of the constitutional exception to the doctrine of sovereign immunity. The suit there was against federal officers to recover land held by them, within the scope of their authority, as a United States military station and cemetery. The question at issue was the validity of a tax sale under which the United States, at least in the view of the officers, had obtained title to the property. \* \* \***

**\* \* \***

**"The Lee case, therefore, offers no support to the contention that a claim of title to property held by an officer of the sovereign is, of itself, sufficient to demonstrate that the officer holding the property is not validly empowered by the sovereign to do so. Only where there is a claim that the holding constitutes an unconstitutional taking of property without just compensation does the Lee case require that conclusion. \* \* \***

(2) *Malone v. Bowdoin*, 369 U.S. 643, 645, 8 L. ed. 2d 168, 170:

"For its view that the sovereign immunity of the United States did not bar the maintenance of this suit, the Court of Appeals found principal support in *United States v. Lee*, 106 U.S. 196, 27 L. ed. 171, 1 S. Ct. 240. In that case the Virginia estate of General Robert E. Lee had been acquired by the United States for non-payment of taxes, although the taxes had in fact been tendered by a third party. An ejectment action was brought against the governmental custodians of the land, upon which a federal military installation and a cemetery had been established. The trial court found that the tax sale had been invalid, and that title to the land was in the plaintiff. This Court upheld a judgment in favor of the plaintiff upon the trial court's finding that the defendants' possession of the land was illegal, holding that a suit against possession of the land was illegal, holding that a suit against them under such circumstances was not a suit against the sovereign.

"In a number of later cases, arising over the years in a variety of factual situations, the principles of the Lee Case were approved. But in several other cases which came to the Court during the same period, it was held that suits against government agents, specifically affecting property in which the United States claimed an interest, were barred by the doctrine of sovereign immunity. While it is possible to differentiate many of these cases upon their individualized facts, it is fair to say that to reconcile completely all the decisions of the Court in this field prior to 1949 would be a Procrustean task.

"The Court's 1949 Larson decision makes it unnecessary, however, to undertake that task here. For in Larson the Court, aware that it was called upon to 'resolve the conflict in doctrine' (337 U.S., at 701), thoroughly reviewed the many prior decisions, and made an informed and carefully considered choice between the seemingly conflicting precedents.

"In that case a suit had been brought against the War Assets Administrator to enjoin him from selling surplus coal which, it was alleged, the Administrator had already sold to the plaintiff. The theory of the action was that where 'an officer of the Government wrongly takes or holds specific property to which the plaintiff has title, then his taking or holding is a tort, and "illegal" as a matter of general law, whether or not it be within his delegated powers,' and that the officer 'may therefore be sued individually to prevent the "illegal" taking or to recover the property "illegally" held.' 337 U.S., at 692. The Court held that this theory was not adequate to support a conclusion that the relief asked was not relief against the sovereign.

"Cutting through the tangle of previous decisions, the Court expressly postulated the rule that the action of a federal officer affecting property claimed by a plaintiff can be made the basis of a suit for specific relief against the officer as an individual only if the officer's action is 'not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void.' 337 U.S., at 702. Since the plaintiff had not made an affirmative allegation of any relevant statutory limitation upon the Administrator's powers, and had made no claim that the Administrator's action amounted to an unconstitutional taking, the Court ruled that the suit must fail as an effort to enjoin the United States.

"While not expressly overruling *United States v. Lee*, (U.S.) *supra*, the Court in *Larson* limited that decision in such a way as to make it inapplicable to the case before us. Pointing out that at the time of the *Lee* decision there was no remedy by which the plaintiff could have recovered compensation for the taking of his land, the Court interpreted *Lee* as simply 'a specific application of the constitutional exception to the doctrine of sovereign immunity.' 337 U.S. at 696.

So construed, the Lee Case has continuing validity only 'where there is a claim that the holding constitutes an unconstitutional taking of property without just compensation.' *Id.* 337 U.S. at 697."

See also Mr. Justice Douglas' dissenting opinion, 369 U.S. 650, 8 L. ed. 2nd 173.

Under *Collector v. Day*, 78 U.S. 113, 20 L. ed. 122, a dual sovereignty had to co-exist and, therefore, under the *Lee Case*, *supra*, as modified by this Court, there was no right, with deference, to sue the State as was done and to include in the restraining order its officers who were but instrumentalities of the State within *Collector v. Day*, *supra*, essential to conduct its business. Compare *Fitts v. McGhee*, 172 U.S. 516, 43 L. ed. 535.

2. The Solicitor General relies upon *Sterling v. Constantin*, 287 U.S. 278, 77 L. ed. 375, Br. p. 19; but, with deference, herein neither Barnett, as Governor, nor Johnson, as Lieutenant Governor, assumed unconstitutionally to seize any property belonging to another, but only to conserve in the emergency the peace and dignity of the State in accordance with their oaths of office; and when they thus so did, the immunity whereto they were entitled as such State officers is thus stated in *Sterling v. Constantin*, 77 L. ed 386:

"\* \* \* As the State has no more important interest than the maintenance of law and order, the power it confers upon its Governor as Chief Executive and Commander in Chief of its military forces to suppress insurrection and to preserve the peace is of the highest consequence. The determinations that the Governor makes within the range of that authority have all the weight which can be attributed to state action, and they must be viewed in the light of the object to which they may properly be addressed and with full

7.

recognition of its importance. It is with appreciation of the gravity of such an issue that the governing principles have been declared.

"By virtue of his duty to 'cause the laws to be faithfully executed,' the Executive is appropriately vested with the discretion to determine whether an exigency requiring military aid for that purpose has arisen. His decision to that effect is conclusive. That construction, this Court has said, in speaking of the power constitutionally conferred by the Congress upon the President to call the militia into actual service, 'necessarily results from the nature of the power itself, and from the manifest object contemplated.' The power 'is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union.' *Martin v. Mott*, 12 Wheat. 19, 29, 6 L. ed. 537, 540, 541. Similar effect, for corresponding reasons, is ascribed to the exercise by the Governor of a State of his discretion in calling out its military forces to suppress insurrection and disorder. *Luther v. Bordon*, 7 How. 1, 45, 12 L. ed. 581, 600; *Moyer v. Peabody*, 212 U.S. 78, 83, 53 L. ed. 410, 415, 29 S. Ct. 235. The nature of the power also necessarily implies that there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for without such liberty to make immediate decisions, the power itself would be useless. Such measures, conceived in good faith, in the face of the emergency and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the Executive in the exercise of his authority to maintain peace. Thus, in *Moyer v. Peabody*, *supra*, the Court sustained the authority of the Governor to hold in custody temporarily one who he believed to be engaged in fomenting disorder, and right of recovery against the Governor for the imprisonment was denied. The Court said that, as the Governor 'may kill

persons who resist,' he 'may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power. So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief.' \* \* \*"

Compare *Cunningham v. Neagle*, 135 U.S. 1, 34 L. ed 55, 75:

"The result at which we have arrived upon this examination is that, in the protection of the person and the life of Mr. Justice Field while in the discharge of his official duties, Neagle was authorized to resist the attack of Terry upon him; that Neagle was correct in the belief that without prompt action on his part the assault of Terry upon the judge would have ended in the death of the latter; that such being his well-founded belief, he was justified in taking the life of Terry, as the only means of preventing the death of the man who was intended to be his victim; that in taking the life of Terry, under the circumstances, he was acting under the authority of the law of the United States, and was justified in so doing; and that he is not liable to answer in the courts of California on account of his part in that transaction.

\* \* \* To the objection made in argument, that the prisoner is discharged by this writ from the power of the state court to try him for the whole offense, the reply is, that if the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if in doing that act he did no more than what was neces-

nary and proper for him to do, he cannot be guilty of a crime under the law of the State of California.  
 . . . "

Reverse the positions and substitute Mississippi for the United States and when the Governor did those things, according to his oath in manner and form as he understood it, and was required to do by the law of the State of Mississippi (that Mississippi's law so required can be demonstrated before its Supreme Court in accordance with *City of Meridian v. Southern Bell Tel. & Tel. Co.*, 358 U.S. 639, 3 L. ed. 2d 562), and in performing his duty, he was the State of Mississippi. The state is the sovereignty which should under the authorities make the determination as to the necessity and propriety of what was done.

## II

### **The Cause Should Be Dismissed As Moot**

When the State, through its administrative officers at the University, determined Meredith not qualified to enter as a man, such decision was not subject to review except as declared in *California Co. v. State Oil & Gas Board*, 200 Miss. 824, 27 So. 2d 542. Under the Federal law, such determination was a "little law"—possibly a "statute", *United States v. Mersky*, 361 U.S. 431, 4 L. ed. 2d 423; *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.*, 284 U.S. 600, 76 L. ed 515, and not reviewable except, with deference, in accordance with the rule in Mississippi. Compare *Light, Heat & Water Co. v. Jackson*, 73 Miss. 644, 19 So. 771; *Vicksburg v. Vicksburg Waterworks Co.*, 206 U.S. 496, 51 L. ed. 1155.

The Solicitor General has assumed to quote the declaration of the President that he, under his oath, had assumed that his duty under the law as he understood it re-

quired action. We claim on behalf of the Governor the same oath and the same obligation to obey. That at issue would be between the United States and the State not as a criminal action but in accordance with the Constitution purely civil. *Between sovereignties there is no law of crime.* Neither can do a wrong, and certainly the law would not tolerate this issue between the President and the Governor to be adjudged in a court as a question of fact. Our submission is that when Meredith graduated he received all vouchsafed to him by the judicial decrees, and having so done, there is now no longer a case or controversy, as was commented by Mr. Justice Douglas in *Williams v. Simons*, 355 U.S. 49, 2 L. ed. 2d 87, 92:

"This Court is empowered by the Constitution to decide cases and controversies. U.S. Const., Art. III, Sec. 2. A cause that has become moot is not a case or controversy in the constitutional sense. *Amalgamated Asso. S.E.R.M.C.E. v. Wisconsin Employment Relations Board*, 340 U.S. 416, 418, 95 L. ed. 389, 391, 71 S. Ct. 373. We cannot underscore this principle too heavily. We have no business in giving any expression of views on the merits, even in hinting one way or another. \* \* \*

Whether a thing be moot or not is determinable by this Court and certainly insofar as civil contempt is concerned, the controversy has disappeared. *United States v. United Mine Workers*, 330 U.S. 258, 91 L. ed. 884. This would leave only a possible criminal contempt and between the Nation, as a sovereign, and the State, as a sovereign, their sovereignty precludes the doing of wrong, as was declared in *Collector v. Day*, 78 U.S. 113, 20 L. ed. 122, 126:

\* \* \* It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the states, nor is there any prohibiting the states from taxing the means and instrumentalities

of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government.  
 \* \* \*

This was re-affirmed in *Graves v. New York*, 306 U.S. 466, 83 L. ed. 927, as to the instrumentalities.

If, therefore, the United States may punish the State by unlawfully impeaching, pauperizing and imprisoning the Governor, with deference, we need not wait for Communism to destroy our great Constitution. Let us not forget *Texas v. White*, 7 Wall. 700, 725, 19 L. ed. 227, 237, wherein Mr. Chief Justice Chase said:

"Not only, therefore, can there be no loss of separate and independent autonomy of the states, through their union under the Constitution, but it may be not unreasonably said that the preservation of the states, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states."

Respectfully submitted,

---

JOE T. PATTERSON,  
 Attorney General of the State  
 of Mississippi,  
 New State Capitol Building,  
 Jackson, Mississippi.

September, 1963.